FRCP 17(a)
FRCP 17(c)
Real Party in Interest

Hoyt v. Bennett (In re Bennett) BAP # OR-03-1383-BKMu
Adv.No. 01-6302-aer Main Case No. 01-64498-aer

12/15/03 BAP (reversing Radcliffe) Unpublished
(No underlying written Bankruptcy Court opinion)

A conservator for a "protected person" was appointed in state court before Debtors' Chapter 7 case was filed. The conservator filed a Section 523 action against Debtor-husband. Approximately 3 months before trial, a successor conservator was appointed in state court. As of the trial date, the successor conservator had not moved to substitute in as Plaintiff. At trial, at the end of the former conservator's case in chief, Debtor moved for dismissal because the real party in interest was not prosecuting the action. The bankruptcy court granted the motion.

On appeal, the Bankruptcy Appellate Panel (BAP) reversed and remanded. The BAP held the bankruptcy court had correctly determined that the former conservator was not the real party in interest. However, the court should have applied FRCP 17(a) and allowed a reasonable time for substitution by the successor conservator. Further, the court should have applied FRCP 17(c) and exercised its duty to inquire whether, and takes steps to assure that, the interests of an incompetent person were being protected. That Plaintiff never requested more time did not relieve the court of this duty.

E03-9(13)

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. OR-03-1383-BKMu
ALLAN LEE BENNETT; WANDA MAY BENNETT; WANDA M. BENNETT, Trustee of the Wanda Bennett Trust,	Bk. No. 01-64498-AER
	Adv. No. 01-6302-AER
Debtors.	
MARK HOYT; Conservator for RONNY LYNN BENNETT; C. FREDERICK BURT, Successor Conservator for Ronny Lynn Bennett,	
Appellants,	
v.	**M E M O R A N D U M**[1]
ALLAN LEE BENNETT; WANDA MAY BENNETT,	
Appellees.	

Argued and Submitted on November 20, 2003
at Pasadena, California

Filed - December 15, 2003

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Albert E. Radcliffe, Chief Bankruptcy Judge, Presiding

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Before: BRANDT, KLEIN and MUND[2], Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of the law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Geraldine Mund, Bankruptcy Judge for the Central District of California, sitting by designation.

This matter arises out of the bankruptcy court's judgment for defendants after trial on the adversary complaint for determination of dischargeability under § 523(a).[3] Without considering FRCP 17, the bankruptcy court entered a judgment dismissing the adversary proceeding. We REVERSE and REMAND.

I. FACTS

The facts are uncontested. Beginning in 1992, Allan Lee Bennett served as conservator appointed by the Marion County Circuit Court for his brother, Ronny Bennett. After he was removed as conservator, Gregory Hansen was appointed successor conservator nunc pro tunc as of 20 July 1994; three successor conservators have been appointed.

On 28 January 1997, after a jury trial, the Polk County Circuit Court for the State of Oregon entered judgment in favor of a successor conservator against defendants Allan Lee Bennett and Wanda May Bennett for breach of fiduciary duty, conversion, fraudulent conveyance, and money damages (the "State Court Judgment").

On 21 February 2001, Mark Hoyt was appointed successor conservator. On 13 June 2001, Allan and Wanda Bennett filed for chapter 13 bankruptcy protection, and later converted to chapter 7. On 9 November 2001, Hoyt, in his capacity as conservator, filed the adversary proceeding seeking a determination that the State Court Judgment is nondischargeable under § 523(a)(4).[4]

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[3] Absent contrary indication, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330. All "Rule" references are to the Federal Rules of Bankruptcy Procedure, "FRCP" references are to the Federal Rules of Civil Procedure, and "FRAP" references are to the Federal Rules of Appellate Procedure.

[4] The record is scant. There is no copy of the petition, schedules, or the complaint. Appellant bears the burden of providing the entire record on appeal. Kritt v. Kritt (In re Kritt), 190 B.R. 382, 387 (9th Cir. BAP 1995).

On 10 March 2003, C. Frederick Burt was appointed successor conservator, replacing Hoyt; the Letters of Conservatorship establish no limitation on his authority. Burt was not substituted as plaintiff in the adversary proceeding.

At trial on 4 June 2003, Plaintiff's counsel alluded to the issue of real party in interest in his opening statement, introduced certain exhibits into evidence, then rested. There was no pretrial objection to Hoyt as real party in interest. Defendant did not file a trial memorandum.

Allan Bennett, who appeared pro se at trial, twice objected to Hoyt's claim to be the real party in interest:

> MR. BENNETT: . . . As to the authority to bring this adversary proceeding, the facts would show that there was no authority at the time it was commenced. And there was the comment that there was a conservator in place all during this controversy is not correct and the facts would show that, if that's relevant. That's all I have, Your Honor.
>
> . . .
>
> With respect to Mr. Linder's advice to the court that the evidence shows that there was authority, the evidence does not show that there was any authority prior to the issuance of the letters of conservatorship.

Transcript, 4 June 2003, pages 6 and 16.

The bankruptcy court inquired of plaintiff's counsel:

> THE COURT: . . . I notice that based on documents you've introduced, and I'm referring specifically to Plaintiff's 7, that effective apparently March 6th of this year, the Marion County Circuit Court appointed C. Frederick Burt to be the successor conservator of the estate of Ronny L. Bennett. This case of course has been prosecuted by Mark Hoyt as the conservator for Mr. Bennett.
>
> Have there been any steps taken to substitute Mr. Burt as the plaintiff in the adversary proceeding?
>
> MR. LINDER: No, there hasn't, Your Honor. We have been working on substituting him into all of the areas for conservatorship, but we haven't filed anything with this court. We've had him put on as being representative, paid for social security, but we haven't done anything with this court, Your Honor.

THE COURT: Well, clearly Mark Hoyt does not have any standing today to proceed, does he?

MR. LINDER: No. Mark Hoyt doesn't. I believe that the real party in interest in this matter is still Ronny Lynn Bennett though.

Transcript, 4 June 2003, pages 16-17.

The court later opined:

While the defendant has objected to these proceedings on the basis that there's a lack of the real party in interest prosecuting the case, based on Plaintiff's Exhibit 7, establishing the fact that C. Frederick Burt is the conservator, not the plaintiff, Mark Hoyt, the defendant would appear to be correct.

. . .

The litigation may be for the benefit of Ronny Bennett, but my understanding from the evidence is that Ronny Bennett is a protected person, that a conservator has been appointed to manage his affairs . . . .

That if anyone has the right to prosecute a claim on behalf of Ronny Lynn Bennett, it would be C. Frederick Burt. C. Frederick Burt was apparently appointed . . .[but] Plaintiff's law firm . . . has taken no steps in this case to substitute C. Frederick Burt and place instead Mark Hoyt as the plaintiff in this adversary proceeding.

Accordingly, I am left with the conclusion that the point made by Mr. Bennett is well taken and this case must be dismissed. An appropriate judgment shall be entered.

Transcript, 4 June 2003, pages 17-19.

On 11 June 2003, the bankruptcy court entered a judgment:

This matter came on for trial on June 4, 2003. Plaintiff appeared through counsel Larry L. Linder. Defendant Allan Bennett appeared pro se. Plaintiff presented his case, after which Defendant moved for a judgment in his favor, based on lack of real party in interest.

The Court having announced its findings and conclusions on the record and therefore being fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that Defendants shall have judgment in their favor based on a lack of the real party in interest prosecuting this action. Plaintiff's amended

complaint is dismissed; and Plaintiff shall take nothing thereby.

Defendants are awarded their costs and disbursement incurred herein.

(emphasis in original).[5]

Hoyt timely appealed.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334, § 157(b)(1) and (b)(2)(A)and (I), and we do under 28 U.S.C. § 158(c).

III. ISSUE

Whether the bankruptcy court abused its discretion by dismissing the adversary proceeding because the plaintiff was not the real party in interest.

IV. STANDARDS OF REVIEW

A. We review the bankruptcy court's dismissal of the adversary proceeding for lack of real party in interest for abuse of discretion. See Wieburg v. GTE Southwest Inc., 272 F.3d 302, 308 (5th Cir. 2001). Under the abuse of discretion standard, we must have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached before reversal is proper. AT&T Universal Card Servs. v. Black (In re Black), 222 B.R. 896, 899 (9th Cir. BAP 1998). A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

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[5] The caption of the judgment erroneously notes Hoyt as the debtor.

B. Standing is a legal issue which we review de novo. Loyd v. Paine Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000); Aheong v. Mellon Mortgage Co. (In re Aheong), 276 B.R. 233, 238 (9th Cir. BAP 2002); Hasso v. Mozsgai (In re La Sierra Fin. Servs., Inc.), 290 B.R. 718, 726 (9th Cir. BAP 2002).

V. DISCUSSION

A. Appellate Standing

Appellee has not raised Hoyt's standing on appeal as an issue, but we have an independent duty to consider it. Aheong, 276 B.R. at 238. "Appellate standing in bankruptcy is determined under the 'person aggrieved' test"[.] Id.

> To have standing to appeal a decision of the bankruptcy court, an appellant must show that it is a "person aggrieved" who was directly and adversely affected pecuniarily by an order of the bankruptcy court. The order must diminish the appellant's property, increase its burdens, or detrimentally affect its rights.

McClellan Fed. Credit Union v. Parker (In re Parker), 139 F.3d 668, 670 (9th Cir. 1998) (citations omitted).

Hoyt has no standing to appeal the judgment dismissing the adversary proceeding. As will be seen, the real party in interest is Burt, the conservator at the time the judgment was entered; Hoyt has no interest in the matter beyond his former status.

On 28 October 2003, we entered an order adding Burt as appellant, absent timely objection. As no objection was filed, we need not explore whether FRAP 43(a) applies; and Burt is an additional appellant. The clerk shall amend the caption accordingly.

B. Merits

1. Standing as Distinguished From Real Party in Interest

We begin by noting that all parties agree that Ronny Lynn Bennett is an incompetent person, and there is no dispute about the fact of Burt's appointment as his successor conservator.

The concepts of standing and real party in interest are confused in the briefs. At trial, the bankruptcy court referred to both standing and real party in interest. Standing is capacity to sue: "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Reynolds v. Feldman (In re Unger & Assoc., Inc.), 292 B.R. 545, 551 (Bankr. E.D. Tex. 2003)(citations omitted). Standing refers to the proper litigant in a suit, and is not identical to the concept of real party in interest. Id.

"Real parties in interest are the persons entitled or entities possessing the right or interest to be enforced through the litigation." 4 James Wm. Moore et al., Moore's Federal Practice § 17.10[1] (3d ed. 2003). "The real party in interest is the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." Unger, 292 B.R. at 551.

FRCP 17 defines who may bring an action in federal court; under FRCP 17(c), a conservator may sue on behalf of an incompetent person. The rule provides:

> (a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee . . . may sue in that person's own name without joining the party for whose benefit the action is brought . . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real

> party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.
>
> . . .
>
> (c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf or the infant or incompetent person . . . . **The court** shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or **shall make such other order as it deems proper for the protection of the infant or incompetent person.** (emphasis added)

Appellant contends, without any citation to authority, that "[r]egardless of who the current conservator was, the conservator had standing to bring this adversary proceeding. The real party in interest was always, and continues to be, Ronny Bennett." Appellant also argues that the same law firm has been retained throughout but assigns no legal significance to this fact in this case, nor can we discern any.

The first part of this statement is incorrect: the current conservator, not the former conservator, has standing to continue to prosecute on behalf of Ronny Bennett. Under Oregon law, a conservator has authority to bring an action on behalf of a "protected person" (defined in Or. Rev. Stat. § 125.005(7)).[6] After issuance of the Letters of Conservatorship substituting Burt on 10 March 2003, only Burt could continue the adversary proceeding on Ronny Bennett's behalf.[7] Appellant

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[6] Or. Rev. Stat. § 125.445(26) provides: "A conservator may perform the following acts without prior court authorization or confirmation if the conservator is acting reasonably to accomplish the purposes for which the conservator was appointed: . . . (26) Prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of duties."

[7] Appellee does not argue that Ronny Bennett does not qualify as an "incompetent person" under FRCP 17(c).

cites no authority that would allow us to interpret the rules or Oregon law to permit a former conservator to continue prosecuting litigation on behalf of a protected person.

The second part of the statement is also inaccurate; under FRCP 1717, the currently serving conservator, not Ronny Bennett, is probably the real party in interest. 4 Moore's Federal Practice § 17.10(3)(c); 6A Chas. A. Wright et al., Federal Practice & Procedure § 1548. In any event, the bankruptcy court correctly ruled that Hoyt, the former conservator, was not the real party in interest.

2. FRCP 17(a)

Citing FRCP 17(a) and one authority, appellant vaguely argues that neither Ronny Bennett nor Burt "have been provided time to prosecute this adversary complaint after objection because no objection was lodged."[8] This is the crux of this appeal. Burt became conservator approximately three months before trial. Bennett's first objection to Hoyt as plaintiff was lodged at the conclusion of plaintiff's case.

The proper procedure when a defendant believes that a cause of action is not being prosecuted by the real party in interest is to object under FRCP 17(a), and pro se litigants must follow the same rules as represented parties. King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987).

Under FRCP 17(a), "[a] motion, either by the parties or by the court, must be made in order to notify the disputed party of the error." See also Weissman v. Weener, 12 F.3d 84, 87 (7th Cir. 1993) (where the court raises the question sua sponte, reasonable time must still be given

[8] Neither party raised FRCP 17 at trial.

to cure the defect); Unger, 292 B.R. at 552-53; FRCP 17 Adv. Comm. Note (1966).

The Advisory Committee on Civil Rules that prepared the current verison of FRCP 17(a) explained:

> The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. In its origin the rule concerning the real party in interest was permissive in purpose; it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

Adv. Comm. Note to 1966 Amendment.

Even if the oral objection sufficed as a motion, granting it without allowing time to remedy was implicitly the application of an erroneous view of the law, and hence, an abuse of discretion.

3. FRCP 17(c)

Our conclusion that we must return this matter to the trial court is reinforced by FRCP 17(c), which requires a court to take whatever measures it deems proper to protect an incompetent person during litigation. This includes a specific obligation to consider whether the person is adequately protected, which the Ninth Circuit regards as no "mere formalism." United States v. 30.64 Acres, 795 F.2d 796, 805-06 (9th Cir. 1986). The failure of a court to inquire into whether, and take steps to assure that, the interests of an incompetent person are being adequately protected "is not an abuse of discretion but a failure to exercise legally required discretion." Id., at 805. That appellant

never requested more time does not relieve the court of this duty. Under the law of the Ninth Circuit, the bankruptcy court was required to exercise this Rule 17(c) "legally required discretion," supported with factual findings, id. at 806, before dismissing the adversary proceeding.

VI. CONCLUSION

The bankruptcy court properly ruled that Hoyt was not the real party in interest, but without considering application of FRCP 17(a) and (c) or allowing a reasonable period for substitution. We REVERSE the judgment dismissing the adversary proceeding and REMAND for further proceedings.

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-03-1383-BKMu

RE: ALLEN LEE BENNETT; WANDA MAY BENNETT; WANDA M. BENNET, Trustee of the Wanda Bennett Trust

A separate Judgment was entered in this case on 12/15/03.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $255 filing fee (effective November 1, 2003) and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this stamp appears was mailed this date to all parties in interest as designated by the Appellant in the Notice of Appeal.

By: Elaine Lewis

Deputy Clerk: December 15, 2003

Elaine Lewis